

FEDERAL MAGISTRATES COURT OF AUSTRALIA

MAHARJAN v MINISTER FOR IMMIGRATION & ANOR [2011] FMCA 200

MIGRATION – VISA – Subclass 573 Higher Education Sector visa – application for review of Migration Review Tribunal decision – spouse – where parties separated – definition of “spouse” – whether MRT required to apply definition of spouse as at the time the applicant was granted a visa or at the date of the decision.

Acts Interpretation Act 1901 (Cth), ss.8, 50

Migration Act 1958 (Cth), ss.5F, 116, 359C, 360, 476

Migration Regulations 1994 (Cth), Regs.1.12, 1.15A

Migration Amendment Regulations 2009 (No.7) Sch. 1

SZEPZ v Minister for Immigration and Multicultural Affairs [2006] FCAFC 107

Lu v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 340; (2004) 141 FCR 346

Pradhan v Minister for Immigration and Multicultural Affairs [1999] FCA 1240; (1999) 94 FCR 91

El Rifai v Minister for Immigration & Anor [2011] FMCA 9

Chen v Minister for Immigration [2010] FMCA 950

Applicant:	LAXMI MAHARJAN
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 2253 of 2010
Judgment of:	Scarlett FM
Hearing date:	16 February 2011
Date of Last Submission:	16 February 2011
Delivered at:	Sydney
Delivered on:	1 April 2011

REPRESENTATION

Solicitor for the Applicant: Mr Newman
Solicitors for the Applicant: Newman & Associates
Counsel for the Respondents: Mr Godwin
Solicitors for the Respondents: DLA Phillips Fox

ORDERS

- (1) The Application is dismissed.
- (2) The Applicant is to pay the First Respondent's costs.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY**

SYG 2253 of 2010

LAXMI MAHARJAN
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Application

1. This is an application for review of a decision of the Migration Review Tribunal. The Tribunal affirmed the decision of a delegate of the Minister for Immigration and Citizenship to cancel the Applicant's Subclass 573 Higher Education Sector visa.
2. The Applicant seeks judicial review of that decision. By her amended application filed on 24th January 2011, the Applicant seeks orders:
 - (a) quashing the Tribunal's decision; and
 - (b) remitting her application to the Tribunal differently constituted.
3. It is doubtful whether the Federal Magistrates Court has power on remitting a matter to the Tribunal to order that the Tribunal be

“differently constituted” (see *SZEPZ v Minister for Immigration and Multicultural Affairs*¹ at [30]).

Background

4. The First Respondent’s written submission contains a useful account of the background to this matter and I have relied upon it for the purpose of setting out the relevant background for this decision.
5. The Applicant is a citizen of Nepal. She was married to Ananda Maharjan on 15th January 2008. On 12th February 2009 she was granted a Subclass 573 Student visa on the basis that she was a member of the family unit of her husband, who held a Subclass 573 Student visa. A member of a family unit includes a spouse (*Migration Regulations 1994*, Reg. 1.12)
6. The Applicant arrived in Australia on 14th March 2009.
7. On 22nd February 2010 the Applicant’s husband wrote to the Department of Immigration and Citizenship, advising that she had not been in his contact since November 2009 and they had been living separately since then. He went on to say:

*So I want you to cancel her visa.*²

8. On 8th June 2010 the Department sent a Notice of Intention to Consider Cancellation to the Applicant, noting that the Department had received advice that her relationship with Ananda Maharjan had ceased. The Notice advised the Applicant her visa was granted on the basis that she was a member of the family unit of Mr Maharjan. The Notice said:

*Given that you have ceased to be a member of the family unit of the primary visa applicant, it appears that you no longer satisfy this criterion and that, therefore, a circumstance which permitted the grant of your visa no longer exists.*³

9. The Notice offered the Applicant an opportunity to give a written response as to why her visa should not be cancelled, asking her to

¹ [2006] FCAFC 107

² See Court Book page 1

³ Court Book 3

provide a response within five working days after she was taken to have received the letter.

10. The Applicant replied by a letter dated 11th June 2010, saying that she was still legally married to Mr Maharjan.⁴
11. The Applicant sent a longer submission dated 13th June 2010, which was received by the Department on the 15th June. In that letter she stated that on 29th March her husband told her that he was not happy to be married to her. She found out that he was having an affair with a woman. He moved out of the apartment. She went on to say:

If I am rejected by my husband and return to Nepal, my life will be a misery. His family will treat me like a servant and as a reject I will have no chance of finding another husband or to remarry. In Nepal wives who are rejected by their spouse or divorced are treated like second class citizens. I am determined not to be one.

If I could, I would like to apply for an independent visa to enable me to continue my studies and education in Sydney. Is this possible I wonder?⁵

12. On 29th June 2010 the delegate of the Minister notified the Applicant that her visa had been cancelled, stating:

I have decided that there is a ground for cancellation of your visa under paragraph 116(1)(a) of the Migration Act 1958...⁶

13. In the Record of Decision of Whether to Cancel Under Section 116 of the Migration Act 1958, the delegate stated:

Given that Laxmi Maharjan has ceased to be a member of the family unit of the primary visa applicant, it appears that Laxmi Maharjan no longer satisfies this criterion and that, therefore, a circumstance which permitted the grant of the visa no longer exists.⁷

14. The delegate went on to say:

Laxmi Maharjan has said that the cancellation of her student visa will cause her hardship in that she will have to return to Nepal to

⁴Court Book 5

⁵ Court Book 7

⁶ Court Book 12

⁷ Court Book 18

be a servant to Ananda Maharjan's family, and that she will have no chance of finding another husband.

I consider that the hardship she may face if she returns to Nepal is a result of the breakdown of her relationship with Ananda Maharjan, rather than the cancellation of her student visa.⁸

Application to the Migration Review Tribunal

15. On 2nd July 2010 the Applicant applied to the Migration Review Tribunal for review of the delegate's decision to cancel her visa.
16. On 15th September 2010 the Tribunal wrote to the Applicant, inviting her to comment on or respond to certain information. The information was that:
 - The Applicant was granted a Subclass 573 student visa on the basis of being a spouse and a member of the primary visa holder.
 - The Applicant's husband wrote to the Department on 22nd February 2010 advising that their relationship had broken down and they had been living separately since November 2009.
 - The Applicant acknowledged in her letter to the Department of 15th June 2010 that their relationship had broken down.
17. The Tribunal's letter explained that the information was relevant to the review because it is indicated that the circumstances that permitted the grant of the visa no longer existed. The letter went on to say:

The above information indicates that you and Mr Maharjan are no longer spouses under Migration Law. You are no longer in a genuine and continuing relationship, no longer live together and do not have a mutual commitment to each other as husband and wife to exclusion of all others. Therefore you are no longer a member of Mr Maharjan's family unit under Regulation 1.12. therefore you no longer meet clause 573.311.⁹

18. The Tribunal's letter invited the Applicant to give comments on or respond to the information in writing by 22nd September 2010. the Tribunal warned the Applicant:

⁸ Court Book 19

⁹ *Ibid* 43

*If the Tribunal does not receive your comments or response within the period allowed or as extended, the Tribunal may make a decision on the review without taking any further action to obtain your views on the information. **You will also lose any entitlement you might otherwise have had under the Migration Act to appear before the Tribunal to give evidence and present arguments.***¹⁰

19. The Applicant did not provide written comments or a response by the time prescribed, or at all. Consequently, the Tribunal proceeded to decide the review without taking any further action to obtain the applicant's views, as provided by s.359C(2) of the *Migration Act*. There was no hearing, because the applicant had lost her entitlement to appear before the Tribunal (s.360(3)).
20. The Tribunal made its decision on 28th September 2010, affirming the delegate's decision to cancel the Applicant's visa.

The Tribunal Decision

21. The Tribunal found that:
 - (a) The Applicant had admitted that she had lived separately and apart from her husband since November 2009;
 - (b) There was no evidence the parties had reconciled;
 - (c) The Applicant admitted that she had no recent contact with Mr Maharjan; and
 - (d) He was having a relationship with another woman.
22. Consequently, the Tribunal found that:
 - (a) The Applicant and her husband were no longer in a genuine and continuing relationship;
 - (b) They no longer lived together; and
 - (c) They no longer had a mutual commitment to each other as husband and wife to the exclusion of all others.¹¹

¹⁰ Court Book 44

¹¹ Court Book 53 at paragraph [34]

23. Having found that the ground for cancellation existed, the Tribunal then considered the exercise of its discretion whether or not to cancel the Applicant's visa, taking into account all of the relevant circumstances of the case. The Tribunal considered:
- (a) The purposes of the visa holder's travel to and stay in Australia;
 - (b) The circumstances in which the ground for cancellation arose;
 - (c) The person's behaviour in relation to the Department;
 - (d) Whether the cancellation would lead to removal in breach of Australia's non-refoulement obligations;
 - (e) Any other matters raised by the visa holder; and
 - (f) Any other relevant considerations.
24. The Tribunal stated:

The Tribunal has considered any stigma the applicant may face if she returns to Nepal. The Tribunal has considered the applicant's claim that she was abused by her former spouse.

However, the Tribunal finds that these considerations are outweighed by the following factors: the fact that the original purpose of the applicant's travel to and stay in Australia no longer exists; the relationship between herself and her former spouse has broken down; the fact that the applicant did not advise the Department about her change in circumstances; the absence of any significant hardship the cancellation would cause to the applicant; and the fact that she has very limited ties in Australia.¹²

25. The Tribunal was satisfied that the reasons for cancelling the visa outweighed the reasons for not cancelling the visa and found that cancelling the visa was the correct and preferable decision.

Application for Judicial Review

26. The Applicant commenced proceedings by filing an application and affidavit in support on 19th October 2010. The application seeks orders quashing the decision of the Tribunal and remitting the application.

¹²*Ibid* at 55 [48]-[49]

27. The amended application gives one ground of review:

The MRT found that at the time of decision a notice issued pursuant to s 116 of the Migration Act 1958 depended upon regulations of the Migration Regulations 1994 but overlooked the fact that those regulations were not determinative of the issue as to whether circumstances no longer existed for the grant of the visa. The Tribunal erred in law and in its jurisdiction by adopting the reasoning of the Department.

Submissions

28. Mr Newman, who appeared for the Applicant, referred the Court to the fact that the relevant regulations were changed in July 2009. The Applicant applied for a visa before 2009, when the earlier version of the regulations applied, but by the time the matter was before the Tribunal the post-July 2009 regulations were in force. The Tribunal did not specify, and should, which it was applying. It was, he submitted, incumbent on the Tribunal to identify the legal basis for its decision by setting out with some particularity the legislation relied on.

29. In his written outline of submissions, Mr Newman set out that both delegate and the Tribunal had assumed that because of a breakdown of the relationship the applicant had by some means unknown to the Applicant ceased to be the spouse of the main applicant and thus ceased to have the right to hold the visa.

30. He submitted that the Tribunal misread or misapplied reg. 1.15A of the *Migration Regulations*, which he set out in full:

(1) *For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the **conditions** in paragraphs 5F (2) (a), (b),(c) and (d) of the Act exist.*

(2) *If the Minister is considering an application for:*

(a) *a Partner (Migrant) (Class BC) visa; or*

(b) *a Partner (Provisional) (Class UF) visa; or*

(c) *a Partner (Residence) (Class BS) visa; or*

- (d) a Partner (Temporary) (Class UK) visa;*
- (b) the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).*
- (1) The matters for subregulation (2) are:*
 - (a) the financial aspects of the relationship, including:*
 - (i) any joint ownership of real estate or other major assets;
and*
 - (ii) any joint liabilities; and*
 - (iii) the extent of any pooling of financial resources,
especially in relation to major financial commitments; and*
 - (iv) whether one person in the relationship owes any legal
obligation in respect of the other; and*
 - (v) the basis of any sharing of day-to-day household expenses;
and*
 - (b) the nature of the household, including:*
 - (i) any joint responsibility for the care and support of
children; and*
 - (ii) the living arrangements of the persons; and*
 - (iii) any sharing of the responsibility for housework; and*
 - (c) the social aspects of the relationship, including:*
 - (i) whether the persons represent themselves to other people
as being married to each other; and*
 - (ii) the opinion of the persons' friends and acquaintances
about the nature of the relationship; and*
 - (iii) any basis on which the persons plan and undertake joint
social activities; and*

(d) the nature of the persons' commitment to each other, including:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one.

(2) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

31. What the Applicant's solicitor submits is that, given that the visa in question was not one of those referred to in (2) (a)-(d) and that the Minister was not bound to consider any or all of the circumstances in (3) (a)-(d) but was entitled to pursuant to (4) above, the Tribunal merely assumed that the Minister had taken these circumstances into account without any foundation whatsoever. When the Departmental decision is examined, regulations 1.12 (1)-(2A) (definition of family unit) are merely reproduced and once more the question of whether the Minister took into account any of the circumstances referred to in Reg. 1.15A was not considered.
32. Thus, he submitted, no reason for the Tribunal's decision is given in circumstances where the Minister was bound to consider the "circumstances" at the time of application but could have done so. Accordingly, the Tribunal before coming to its decision was required to make a determination and one that had a factual basis.
33. Mr Newman submitted that the matter should be sent back to the Tribunal.

34. Counsel for the Minister, Mr Godwin, submitted that the Tribunal had made it clear which version of the regulation it was using, when it stated:

*At the time the visa was granted on 12 February 2009 clause 573.311 stated:*¹³

35. Further, at paragraph [30], the Tribunal said:

Paragraph 1.12(1)(a) is relevant to the applicant's circumstances and states a person is a member of the family unit if they are the applicant's spouse. 'Spouse' is defined in regulation 1.15A.

36. The intention of the Parliament was that for visa applied for before 1st July 2009, when the regulations changed, the old definition of a spouse should be applied. Since the application for the visa was made in February 2009, the change in the regulation did not apply to the Applicant.
37. Alternatively, it was submitted that if the Court took the view that the Tribunal was required to apply the Act and the Regulations in force at the date of its decision to determine whether the circumstances that permitted the grant of the visa no longer existed (rather than at the date that the Applicant applied for her visa), then upon its repeal, the substance of what had been regulation 1.15A became s.5F of the Act.
38. Mr Godwin submitted that Regulation 1.15A in its current form is the regulation made for the purposes of s.5F(3). The findings of fact by the Migration Review Tribunal were that the Applicant did not meet factors 5F (2)(b)-5F(2)(d), which are the same as reg. 1.15A(1A)(b) prior to its repeal. It was submitted that the Tribunal applied the correct test but give it the wrong statutory label, which does not amount to jurisdictional error.
39. The factual findings made by the Tribunal in this case meant that the Applicant did not meet the definition of spouse in s.5F. Thus, the Applicant could not have achieved a different outcome even if the Tribunal had applied the definition of spouse in s.5F. If the Tribunal erred in law by applying the wrong statutory provisions and this was a jurisdictional error, (which the Minister does not concede), then, it was

¹³ Court Boo 52 at [28]

submitted, relief should be withheld in the exercise of the Court's discretion. The test is whether the Applicant has been deprived of the possibility of a successful outcome by the decision-maker's failure to observe the requirements of the statute (see *Lu v Minister for Immigration and Multicultural and Indigenous Affairs*¹⁴ at [64]).

Conclusions

40. The issue to be decided is whether the Migration Review Tribunal was required to apply the definition of "spouse" as at the date of the grant of the Applicant's visa or at the time of the Tribunal decision. The Minister submits that the law which the Tribunal had to apply was the law that applied at the time the Applicant was granted her visa. I am of the view that this submission is correct.
41. Regulation 1.15A was repealed and substituted in a new form on 1st July 2009. In its earlier form, Reg. 1.15A contained the definition of "spouse" for the purpose of the Regulations. In this form, the Tribunal was required to consider that definition when making its decision. When Reg.1.15A was repealed, the definition of "spouse" was moved to s.5F of the Act. Section 5F allowed the Regulations to specify factors that could be taken into account when applying that definition. Those factors are set out in the new Reg. 1.15A.
42. Regulation 1.15A was repealed and substituted by Item 29 in Schedule 1 to the *Migration Amendment Regulations 2009 (No.7)* which took effect on 1st July 2009. The provisions of the new Regulation 1.15A are set out at [30] above. Regulation 3(2) provides that the amendments made by Schedule 1 apply in relation to a visa made on or after 1 July 2009. As the Applicant had applied for her visa before 1st July 2009, it is the earlier version of Reg.1.15A that applies to her. As counsel for the Minister submitted, the Applicant had a vested right to have her circumstances assessed against the criteria for the visa as they stood at the time the visa was granted (see *Acts Interpretation Act 1901*, ss.8 and 50; *Pradhan v Minister for Immigration and Multicultural Affairs*¹⁵). The law that the Tribunal was required to apply was the pre-

¹⁴ [2004] FCAFC 340; (2004) 141 FCR 346

¹⁵ [1999] FCA 1240; (1999) 94 FCR 91

repeal version of Reg. 1.15A. The Tribunal was required to apply the definition of “spouse” as it appeared in that regulation.

43. Counsel for the Minister has drawn the Court’s attention to the decisions of *El Rifai v Minister for Immigration & Anor*¹⁶ and *Chen v Minister for Immigration*¹⁷, where in each case the court referred to the definition of “spouse” in s.5F as being the applicable law in cases where a visa application had been made prior to 1st July 2009. However, the fact that there had been a change in the law was not brought to the attention of the Court and so the matter was not argued before the Court.

44. The Tribunal applied the definition of “spouse” as it stood at the time the Applicant’s visa was granted in February 2009. The version of Reg. 1.15A that was in force at the time read;

45. *1.15A (1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:*

(a) in a married relationship, as described in subregulation (1A); or

(b) in a de facto relationship, as described in subregulation (2).

(c) (1A) Persons are in a married relationship if:

(a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and

(b) the minister is satisfied that:

(i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others: and

(ii) the relationship is genuine and continuing; and

(iii) they:

i. live together; or

ii. do not live separately and apart on a permanent basis.

¹⁶ [2011] FMCA 9

¹⁷ [2010] FMCA 950

- (2) *(not relevant)*
- (3) *In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:*
- ii) *(ab) a Special Eligibility (Residence) (Class AO) visa; or*
 - iii) *(ad) a Partner (Migrant) (Class BC) visa; or*
 - iv) *(ae) a Partner (Provisional) (Class UF) visa; or*
 - v) *(af) a Partner (Residence) (Class BS) visa; or*
 - vi) *(ag) a Partner (Temporary) (Class UK) visa;*
 - vii) *The Minister must have regard to all of the circumstances of the relationship, including, in particular:*
 - (a) the financial aspects of the relationship, including:*
 - (i) any joint ownership of real estate or other major assets; and*
 - (ii) any joint liabilities; and*
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and*
 - (v) the basis of any sharing of day-to-day household expenses;*
 - (b) the nature of the household, including:*
 - (i) any joint responsibility for care and support of children, if any, and*
 - (ii) the parties' living arrangements; and*
 - (iii) any sharing of responsibility for housework;*
 - (c) the social aspects of the relationship, including:*

- (i) *whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
- (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
- (iii) *any basis on which the persons plan and undertake joint social activities;*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*
- (2) *In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for a visa of a class other than the class specified in paragraph (3)(ab), (ad), (ae), (af) or (ag), the Minister may have regard to any of the factors set out in subregulation (3).*
- (3) *If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.*

viii)

46. Regulation 1.15A(1)(a), as it was in February 2009, required that the Applicant had to meet the cumulative requirements in reg. 1.15A(1A) in order to be a spouse for the purpose of the Regulations. The Tribunal

did not accept¹⁸ that the Applicant's relationship satisfied the requirements in reg. 1.15A(1A)(b). In other words, the Applicant was no longer the spouse of Mr Ananda Maharjan, the primary visa holder, which meant that she was no longer regarded as a member of the primary visa holder's family unit according to reg. 1.12.

47. The Tribunal correctly applied the requirements of the regulations to determine that the circumstances that permitted the grant of the visa no longer existed. The Tribunal did not fall into error when it found that a ground for cancellation of the Applicant's visa had been established.
48. The Tribunal considered whether to exercise its discretion to determine whether or not the decision to cancel the Applicant's visa was the correct and preferable decision, taking into account all of the relevant circumstances of the case. Whilst the Tribunal's decision was not a happy one for the Applicant, there was no error of law in the way the Tribunal approached its task.
49. No jurisdictional error is established.
50. The application will be dismissed. Costs usually follow the event in matters of this nature.

I certify that the preceding 49Error! Style not defined.Error! Style not defined.Error! Style not defined.forty-nine (49) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Date: 25 March 2011

¹⁸ There appears to be a typographical error in paragraph [33] of the Tribunal decision, in that the word "not" appears to have been omitted after the words "*The Tribunal does*" see Court Book 53